Supreme Court, U.S.
FILED
JUN 3 1992
OFFICE OF THE CLERK

(3)

No. 91-1641

In the Supreme Court of the United States

OCTOBER TERM, 1991

FEDERAL BUREAU OF INVESTIGATION, ET AL., PETITIONERS

v.

JONATHAN M. WIENER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent does not come to grips with any of the reasons set forth in our petition for granting certiorari. Instead, he simply, and mistakenly, denies that the Ninth Circuit has adopted a maximum-detail standard of specificity for *Vaughn* indices. Respondent dismisses the novel substantive requirements established by the Ninth Circuit for the exemptions at issue as dicta, even though the court's discussion of those requirements consumes the bulk of its opinion. He similarly shrugs off the fact that the Ninth Circuit itself disclosed exempt information in applying its maximum-detail standard. These avoidance tactics cannot obscure the unprecedented nature of the decision below, upon which numerous district courts in the Ninth Circuit have already relied to

require a level of detail in *Vaughn* indices unparalleled in the other circuits.

1. Respondent asserts (Br. in Opp. 5) that the Ninth Circuit "simply applied settled procedural principles of FOIA litigation to the particular facts of this case." The Ninth Circuit's own conduct refutes that assertion. The Ninth Circuit has required the submission of additional *Vaughn* indices, even though the district court has already reviewed six public declarations, two *in camera* declarations, and the disputed documents themselves in unredacted form. See Pet. 2; Pet. App. 2a. As we explained in the petition, in this respect the decision below is unprecedented. Pet. 14. We are not aware of any other decision (and respondent cites none) in which a court of appeals has required the submission of additional *indices* after the district court has reviewed the *documents* themselves. Instead, until the decision below, the courts of appeals had uniformly held that, when a district court determines that the *Vaughn* indices are inadequate, it has discretion to inspect the disputed documents *in camera*. See Pet. 14 n.10 (citing cases).

Respondent unwittingly confirms the unprecedented nature of the Ninth Circuit's decision by featuring *Church of Scientology* v. *IRS*, 792 F.2d 146 (D.C. Cir. 1986), as a case "[d]irectly on point" (Br. in Opp. 16). Actually, *Church of Scientology* involved quite different facts from the present case, but it is relevant inasmuch as it sharply undercuts respondent's position. *Church of Scientology* did not even involve the adequacy of a *Vaughn* index, as does the present case. In *Church of Scientology*, the government did not submit any *Vaughn* index, either publicly or *in camera*. 792 F.2d at 153. The district court granted summary judgment for the gov-

ernment based solely upon its *in camera* inspection of a 5600-page sampling of the disputed documents. *Id.* at 148.[1]

The D.C. Circuit reversed, holding that "such an approach cannot be applied to large numbers of documents—much less to large numbers of documents that represent only a sampling." *Church of Scientology*, 792 F.2d at 153. At the same time, the court stressed that "*in camera* * * * inspection of each of a small number of documents without detailed public affidavits and *Vaughn* indices is sometimes acceptable." *Ibid.* (citing *Currie* v. *IRS*, 704 F.2d 523 (11th Cir. 1983)). Moreover, while the court required the IRS on remand to support its exemption claims by submitting "an appropriate combination of

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[1] Likewise, none of the other D.C. Circuit decisions cited by respondent involved the adequacy of a *Vaughn* index. In *Cuneo* v. *Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), cited in Br. in Opp. 17, the district court granted summary judgment for the government based solely on its *in camera* inspection of disputed documents. The government had not submitted a *Vaughn* index, and the D.C. Circuit held that the government was required to do so. Respondent's reliance (Br. in Opp. 15) on *Lykins* v. *United States Dep't of Justice*, 725 F.2d 1455 (D.C. Cir. 1984), and *Phillippi* v. *CIA*, 546 F.2d 1009 (D.C. Cir. 1976), is also wide of the mark. In *Phillippi*, the district court relied solely on an *in camera* declaration; the government did not submit a public *Vaughn* index, and the court refused to examine the documents themselves *in camera*. 546 F.2d at 1012-1013. Moreover, in reversing, the court of appeals recognized, in sharp contrast to the court of appeals below, that "FOIA contemplates that the courts will resolve fundamental issues in contested cases on the basis of *in camera* examinations of the relevant documents." *Ibid.* In *Lykins*, the court of appeals affirmed in part a district court decision that was based on the court's *in camera* inspection of the disputed documents and declarations, finding "no reason to believe that [the district court] reached an incorrect result" as to one of the disputed documents. 725 F.2d at 1463. As to another document, the court remanded the case because no public *Vaughn* index had been provided. *Id.* at 1465.

detailed public affidavits and (if necessary) indices," the court expressly authorized "resort[] to *in camera* examination of documents and affidavits [if] th[e] [public affidavits and declarations] proved inadequate." *Church of Scientology*, 792 F.2d at 153. That is precisely what the court of appeals in this case held was *not* authorized. The Ninth Circuit expressly disapproved the district court's resort to *in camera* inspection, holding that *in camera* review is "only appropriate" after the government has submitted a *Vaughn* index that meets the Ninth Circuit's maximum-detail standard. Pet. App. 8a.

Contrary to respondent's contention, it is *Church of Scientology*, and not the decision below, that reflects the "settled procedural principles of FOIA litigation" (Br. in Opp. 5). Prior to the decision below, it was well settled that "the [district] court's management of [a FOIA] case w[ould] not be disturbed absent an abuse of discretion." *Currie*, 704 F.2d at 530; see also *Silets* v. *United States Dep't of Justice*, 945 F.2d 227, 229 (7th Cir. 1991), petition for cert. pending, No. 91-1133. Thus, the courts of appeals uniformly recognized that the proper inquiry on appeal was whether the district court had an adequate factual basis on which to make the *de novo* determination required by FOIA. See, *e.g.*, *Vaughn* v. *United States*, 936 F.2d 862, 867 (6th Cir. 1991); *Currie*, 704 F.2d at 528. With similar consistency, the courts of appeals held that a *Vaughn* index provides an adequate factual basis if it "(1) describe[s] the withheld documents and the justifications for nondisclosure with reasonably specific detail, (2) demonstrate[s] that the information withheld falls logically within the claimed exemption, and (3) [is] not controverted by either contrary evidence in the record or by evidence of bad faith." *Silets*, 945 F.2d at 229

(quoting *Kimberlin* v. *Department of Treasury*, 774 F.2d 204, 210 (7th Cir. 1985)).[2]

Here, in contrast, the Ninth Circuit considered it irrelevant that the district court had an adequate factual basis for its decision.[3] All that mattered, in the court of appeals' view, was that the government disclose "as much information as possible," purportedly in order to maximize respondent's opportunity to argue for disclosure. Pet. App. 7a. Certainly, nothing in the *statute* creates such a procedural entitlement; the statute does not mandate *Vaughn* indices in the first place, but *does* expressly authorize *in camera* review of the actual documents.

2. The district courts in the Ninth Circuit do not share respondent's view that the decision below reflects merely an "unremarkable" application of "well-settled standard[s]" (Br. in Opp. 6, 20 n.19). As discussed in our petition, courts in several pending cases have relied on the decision below to order the government to prepare and submit additional, maximum-detail *Vaughn* indices. Pet. 21-22 nn.17-18, 25 n.21. Those orders, entered so far in only a portion of the dozens of FOIA cases pending against the government in the Ninth Circuit, have

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[2] Respondent distinguishes *Silets* (Br. in Opp. 17-18) based on the procedural posture of that case. Respondent does not, however, respond to our argument (Pet. 22-24) that the Seventh Circuit in *Silets* applied quite different standards for judging the adequacy of *Vaughn* indices than the Ninth Circuit announced in the present case.

[3] Contrary to respondent's contention (Br. in Opp. 13 n.12), the district court made clear that it "carefully" examined the government's *in camera* declarations, to which the unredacted documents were appended (Pet. App. 36a), and that it based its decision on the *in camera* declarations and the public declarations (*id.* at 32a-35a).

required the expenditure of hundreds of additional hours of attorney time. Pet. 21-22 n.17.

Miscavige v. *IRS*, Civ. No. 88-7341-TJH (Kx) (C.D. Cal.), is representative.[4] In that case, the plaintiff seeks access to some 53,000 pages of records withheld in whole or in part. Over a period of six months, the Service devoted almost 2200 hours of attorney time and 500 support-staff hours to produce a 5436-page *Vaughn* index. Prior to the decision below, the district court issued an order denying the plaintiff's motion for a more detailed *Vaughn* index. In light of the decision below, however, the Special Master has recommended that the district court vacate its order, stating that the Ninth Circuit now "seems to require a much greater degree of specificity in a Vaughn Index than previously thought." First Report of Special Master in *Miscavige*, *supra*, at 1 (May 22, 1992).

Similarly, in *Church of Scientology Int'l* v. *IRS*, No. CV-91-1025-RSWL (Sx) (C.D. Cal. order dated Nov. 14, 1991), the district court initially denied the plaintiff's motion to compel preparation of a *Vaughn* index, holding that "the *Vaughn* index is not the only means by which Defendant may sustain its burden of establishing that the withheld documents are properly exempt from disclosure. . . . Thus, Defendant may sustain its burden by submitting detailed, non-conclusory affidavits setting forth facts sufficient to establish each exemption with a motion for summary judgment." *Id.* at 2-3 (quoting prior order of June 21, 1991). The court granted reconsideration of that ruling, however, after the decision below was issued. The court determined that revision of the prior

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[4] See also *Tsang* v. *CIA*, No. CV 91-4438 WMB (C.D. Cal. order dated June 1, 1992) (applying *Wiener* to require more detailed *Vaughn* index); 4/7/92 Findings of Fact and Concl. of Law on Pltfs. Renewed Mot. for Summ. J'mt in *Selby* v. *United States Dep't of Justice*, CV 91-0342-RG (GHKx) (C.D. Cal.) (applying *Wiener*).

order was necessary because "*Wiener* * * * heighten[s] the demands which will be placed on the government * * * in these actions." *Id.* at 3.[5]

In addition to the significant and unwarranted demands that the decision below places on the government, the courts likewise confront substantial and unjustified new burdens. Respondent confirms (Br. in Opp. 22) our observation (Pet. 21) that another round of district court and appellate litigation is likely in this nine-year-old lawsuit, again concerning only the adequacy of the *Vaughn* indices, before even reaching the merits of the district court's decision. Indeed, such endless litigation could well become the rule in the Ninth Circuit, given the requirement that the government disclose as much as it can in the *Vaughn* index without revealing exempt information, and the prohibition on *in camera* review until the government has done so. See *Starkey* v. *IRS*, No. CV 91-4158-WDK (C.D. Cal. order dated Nov. 17, 1991), at 6 n.3 (citing *Wiener* for the proposition that district

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[5] Respondent does not address in any meaningful way our showing that the Ninth Circuit's maximum-detail requirement will impose a staggering burden on government agencies in FOIA litigation. Instead, respondent groundlessly criticizes the government for failing to document the impact of the decision below before the decision was issued. Br. in Opp. 19 n.18. Respondent also erroneously suggests that it is undisputed that the government could have disclosed more in its public *Vaughn* indices than it did (*id.* at 15-16). In fact, the declarant who prepared the FBI's *Vaughn* index regarding non-Exemption 1 claims stated that "[t]o further describe with any more specificity the information being withheld would identify the very material sought to be protected." Clerk's Record (CR) 18 ¶ 21. The author of the FBI's declaration regarding information withheld under Exemption 1 similarly stated that "the degree of declassification and marking for disclosure is as great as permissible without placing the national security in jeopardy." CR 17 ¶ 6 n.8.

courts lack discretion to conduct *in camera* review if the *Vaughn* index is inadequate).[6]

Moreover, there is a significant risk that, in laboring under this new procedural regime, the courts will themselves disclose exempt information, like the Ninth Circuit did here. See Pet. 17-18, 19-20. Contrary to respondent's assertion, Br. in Opp. 20 n.19, the Ninth Circuit's inability to apply its own standard without making unlawful disclosures convincingly demonstrates both the unworkability of that standard and the serious risk that courts confront in attempting to apply it.

3. The panel below would be surprised to learn that its discussion of the requirements that the government must meet on remand, which consumed the bulk of its opinion (Pet. App. 8a-28a), "will have no impact on the interpretation and scope of FOIA exemptions," as respondent asserts (Br. in Opp. 20-21). Unlike respondent, the lower courts have not treated the court of appeals' discussion as dictum.

For example, in *Selby* v. *United States Dep't of Justice*, No. CV 91-0342 RG (GHKx) (C.D. Cal. order dated Apr. 7, 1992), the district court expressly relied on the

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[6] Respondent does not directly respond to our point that the decision below will breed pointless and burdensome litigation regarding the adequacy of *Vaughn* indices. Instead, he sets up a strawman by asserting (Br. in Opp. 13) that the courts should not be required to review an agency's decision to withhold documents "without the benefit of the government's * * * guidance," followed by a citation to a decision that (though it is not noted in respondent's citation) was subsequently vacated, *Seafarers Int'l Union* v. *Baldovin*, 508 F.2d 125, vacated, 511 F.2d 1161 (5th Cir. 1975). Respondent later suggests that the district court here made its decision on the basis of *in camera* inspection of the documents "alone" (Br. in Opp. 18). Nothing could be further from the truth. As we explained in our petition, Pet. 2-4, the government submitted, in addition to the unredacted documents, six public *Vaughn* indices and two *in camera* declarations.

Ninth Circuit's holding in this case regarding the FBI's claims under Exemption 7(D), 5 U.S.C. 552(b)(7)(D). The panel held that, in order to justify withholding information provided under an implicit assurance of confidentiality pursuant to Exemption 7(D), the FBI must identify, for each source, "the circumstances surrounding the receipt of information which led the FBI to conclude the informant would not have given the information without an implicit assurance of confidentiality." Pet. App. 26a. As explained in our petition, the Ninth Circuit's holding on Exemption 7(D) is in direct conflict with the decisions of at least five other circuits, which hold that the FBI need not demonstrate an implicit assurance of confidentiality on a source-by-source basis. Pet. 18-19.

Similarly, the Ninth Circuit's holding in this case on the government's Exemption 7(C) claims conflicts with this Court's decision in *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), as well as decisions of the D.C. Circuit and the Eleventh Circuit. See Pet. 15-17; see also *Church of Scientology*, 792 F.2d at 152 ("When * * * a claimed FOIA exemption consists of a generic exclusion, dependent upon the category of records rather than the subject matter which each individual record contains, resort to a *Vaughn* index is futile.").

The Ninth Circuit's establishment of substantive requirements for invoking the FOIA exemptions at issue were plainly intended to have, and will have, a concrete impact both on remand in this case and in other FOIA litigation. That those requirements flow directly from the Ninth Circuit's erroneous standard for *Vaughn* indices reinforces the need for further review.

4. This case graphically illustrates the need for "workable rules" to govern the manner in which FOIA litigation is conducted. See Pet. 24-25. By respondent's

own estimate, he has received "twenty-six pounds of FBI and Immigration and Naturalization Service files * * * under the Freedom of Information Act." J. Wiener, *Come Together: John Lennon in His Time*, liner notes (1984). The district court's judgment reflects that disclosure of the comparatively little information that remains in dispute will not vindicate the public's interest in knowing "what th[e] government is up to." *Reporters Committee*, 489 U.S. at 773 (internal quotation marks omitted) (citations omitted). Nonetheless, disdaining to review the district court's judgment on the merits, the court of appeals has remanded for further proceedings that promise to be far more elaborate than anything yet confronted in this nine-year-old litigation. The concomitant drain on agency and judicial resources serves only to undermine FOIA's policy of "expediting disclosure." *FTC* v. *Grolier Inc.*, 462 U.S. 19, 28 (1983).

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For the foregoing reasons, and those set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

JUNE 1992